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YALE LAW JOURNAL

Vol. XIX

JANUARY, 1910.

No. 3

THE PROPOSED HIGH COURT OF NATIONS

An international court was one of the first ideas proposed in the practical program of the world peace movement. As early as 1840, the constitution and functions of such an institution were worked out by William Ladd, the founder of the American Peace Society.¹ This legal preventive of war was afterwards urged by the Peace Society and in later years was predicted by Edward Everett Hale as sure to be realized. But not till the First Hague Conference met in 1899 did an International Arbitration Court come into existence. The Permanent Court of Arbitration, as it is technically called, though popularly known as the Hague Court, settled the Pious Fund case, the Venezuela preferential question, the Japanese house-tax case, and the dispute between Great Britain and France over their treaty rights in Muscat; passed upon the Casablanca incident, adjusted the dispute between Norway and Sweden as to their maritime frontier, and has pending before it the fisheries dispute between the United States and Great Britain, and the Oronoco steamship case between the United States and Venezuela.

That the court has been a success on the whole is beyond question. The only serious fault found with its decisions has been in connection with the Venezuela preferential claims question. In that case the court was accused of favoring the side of military

¹ See *Prize Essays on a Congress of Nations*. Boston, 1840. p. 550. Dr. Trueblood, the distinguished secretary of the Peace Society today, says that Ladd left little to be said on the subject. See also an address on Ladd's project by Prof. James Brown Scott in the *Advocate of Peace*, August and September, 1908. p. 196. It contains the substance of Ladd's plan.

force which it was established to supersede; but its decision was accepted as law and was approved by such high legal authorities as Chief Justice Baldwin of Connecticut, and Professor John Bassett Moore of Columbia. (See *Mohonk Report* for 1904.) Other criticisms, however, have been made with regard to its constitution and the practice of its members, which will be dealt with later. The fact that nearly a hundred arbitration treaties, including twenty-four made by the United States, pledge most of the nations to refer certain classes of disputes to it, shows that it has won public confidence and has, to a large degree, become fixed in the life of the world. But besides this court, which is actually in service, are two others, both of them created by the Second Hague Conference, that may also go into operation when certain formalities are complied with or certain necessities arise. One of these is the International Prize Court, which is for the adjudication of cases of capture of neutral merchant ships and cargoes in time of war, a code for which was made at the Naval Conference held in London in 1909, but has not been ratified by the nations that are parties to it. The other is the Court of Arbitral Justice, also called the Judicial Arbitration Court, which is for the same kind of cases that now go to the Permanent Court of Arbitration. It is the Court of Arbitral Justice, an institution that is known to but comparatively few American people, and that may easily be confused in the popular mind with the present Hague Court, to which I wish to call attention.

But why, it may be asked, should we have a new court when we already have one that is successful and acceptable? The answer reveals the wonderfully rapid growth of the peace cause within the past decade and is of special interest to lawyers because it is they who, coming to the aid of the movement, are responsible for the proposition. Improvements upon the procedure of the court of 1899 were suggested by various writers; but, except for the *American Journal of International Law*,² practically no peace literature up to the time of the Second Hague Conference proposed a new court, nor has any demand been made for it either by peace societies or by the resolutions of the Inter-parliamentary Union, which are frequently taken as the platform of the peace movement.

² See *A Permanent Tribunal of International Arbitration; Its Necessity and Value*. By R. Floyd Clarke. *American Journal of International Law*. Vol. I, p. 342. April, 1907.

The new court is due primarily to the efforts of three great American lawyers. They are Ex-Secretary Root, Professor James Brown Scott, and Hon. Joseph H. Choate, especially the two men first named. All who attended the opening session of the National Peace Congress in New York in 1907, which was organized for the purpose of bringing public sentiment to bear on the Hague Conference, will remember the profound impression made by Mr. Root's address.⁸ In it occurred these significant passages, which may be taken as the foundation ideas of the new court:

"In the general field of arbitration we are surely justified in hoping for a substantial advance, both as to scope and effectiveness. It has seemed to me that the great obstacle to the universal adoption of arbitration is not the unwillingness of civilized nations to submit their demands to the decision of an impartial tribunal; it is rather an apprehension that the tribunal selected will not be impartial."

Mr. Root quoted in support of his position a despatch that Lord Salisbury sent to Sir Julian Pauncefote, March 5, 1896, in which the difficulty of selecting impartial judges from a panel of arbitrators on account of popular sympathy for one side or another, is pointed out. He said:

"The feeling which Lord Salisbury so well expressed is, I think, the great stumbling block in the way of arbitration. The essential fact which supports that feeling is, that arbitrators too often act diplomatically rather than judicially; they consider themselves as belonging to diplomacy rather than to jurisprudence; they measure their responsibility and their duty by the traditions, the sentiments and the sense of honorable obligation which have grown up in centuries of diplomatic intercourse, rather than by the traditions, the sentiments and the sense of honorable obligation which characterize the judicial departments of civilized nations. Instead of the sense of responsibility for impartial judgment which weighs upon the judicial officers of every civilized country, and which is enforced by the honor and self-respect of every upright judge, an international arbitration is often regarded as an occasion for diplomatic adjustment. Granting that the diplomats who are engaged in an arbitration have the purest motives; that they act in accordance with the policy they deem to be best for the nations concerned in the controversy; assuming that they thrust aside entirely in their consideration any interests which their own countries may have in the controversy, or in securing the favor or averting the displeasure of the nation the litigant nations find that questions of policy and not parties before them; nevertheless it remains that in such an arbi-

⁸ *New York Peace Congress Report*, 1907, p. 34. *Advocate of Peace*, May, 1907.

simple questions of fact and law are submitted to alien determination, and an appreciable part of that sovereignty which it is the function of every nation to exercise for itself in determining its own policy, is transferred to the arbitrators."

Mr. Root illustrated his view by reference to the satisfactory settlement by arbitration of disputes among South American States, the arbitrators of which were detached from international politics and confined themselves to the merits of the questions before them, "as a trained and upright judge decides a case submitted to his court."

"What we need for the further development of arbitration," added Mr. Root, "is the substitution of judicial action for diplomatic action, the substitution of judicial sense of responsibility for diplomatic sense of responsibility. We need for arbitration, not distinguished public men concerned in all the international questions of the day, but judges who will be interested only in the question appearing upon the record before them. Plainly this end is to be attained by the establishment of a court of permanent judges who will have no other occupation and no other interest but the exercise of the judicial faculty under the sanction of that high sense of responsibility which has made the courts of justice in the civilized nations of the world the exponents of all that is best and noblest in modern civilization."

Mr. Root was at this time Secretary of State and in a position to give his ideas effect. He therefore embodied them in his instructions to our delegates to the Second Hague Conference.⁴ His outline, which was calculated to put arbitration upon a judicial instead of a diplomatic basis, was elaborated by Professor James Brown Scott, Solicitor of the Department of State, and technical delegate to The Hague. Professor Scott, whose name will always be associated with historic attempts to make a High Court of Nations, gave his whole soul to the proposed court at the time and has done his utmost ever since to have it made into a living agency of justice. His plan was brought before the Conference by Mr. Choate, who assisted him enthusiastically. It had the joint sponsorship of the United States, England and Germany. No less strenuous a personage than Baron Marschall von Bieberstein, Germany's first delegate, expressed the belief that such a court would automatically attract to itself the disputes of nations for settlement.⁵

⁴ Scott's: *The Hague Peace Conferences of 1899 and 1907*. Vol. I, p. 91.

⁵ Hull: *The Two Hague Conferences*, p. 411. Also Hayne Davis: *The Second Peace Conference at The Hague*, p. 36.

The agreement providing for the new court contains thirty-five articles.⁶ The first article reads as follows:

"With a view to promoting the cause of arbitration, the contracting Powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Judicial Arbitration Court, of free and easy access, composed of judges representing the various juridical systems of the world, and capable of ensuring continuity in jurisprudence of arbitration."

The main features of the new court correspond with Mr. Root's idea of a court of law. They may be best appreciated in a comparison with the present Permanent Court of Arbitration. First of all, the new institution is a court and not a panel. The number of its judges, though not given in the agreement, is expected to be fifteen, with deputies as alternates. Fifteen members would mean nearly twice as large a body as the Supreme Court of the United States, which consists of nine judges, but is small compared with the number allowed to the court of 1899, which may consist of four arbitrators from every one of the forty-six States that are commonly recognized as belonging to the family of nations, though two or more States may choose the same judges and may therefore go outside their own nationality for their appointees.

Many smaller Powers have appointed only one or two judges of this court. But the arrangement, as already carried out, means about one hundred judges, and might mean nearly two hundred, or so large a body as could never conveniently come together, or which, if it did, would be a judicial assembly rather than a court, which is undesirable. On the other hand, fifteen judges make a body that is not unwieldy, but sufficiently large to guarantee impartiality, which is better secured, especially in important cases, by having a moderately large rather than a small tribunal, say of three or five members.

Next there is the essential characteristic of permanence. The court of 1899 is styled "permanent," but as Professor Scott has pointed out, this is a misnomer.⁷ The panel is permanent, but the

⁶ It may be found in the January, 1908: *Supplement to the American Journal of International Law*, p. 29; in Professor Scott's: *Texts of the Peace Conference at The Hague, 1899 and 1907*, p. 141; and in Scott's: *The Hague Peace Conferences of 1899 and 1907*. Vol. II, p. 291.

⁷ See Scott's: *The Hague Peace Conferences of 1899 and 1907*. Vol. II, p. 443.

tribunal is only temporary as it is selected for every new case. In spite of the efforts of the United States to make it permanent, the court of 1899 was never intended by the Powers to be so. Andrew D. White, delegate to the First Hague Conference, said in an address at Mohonk:⁸

"First, it has been argued that the Hague Tribunal should sit steadily and permanently, thus resembling the Supreme Court of the United States. This idea was embodied in the first American proposal made in 1899, but an almost unanimous opinion was soon developed against it. It was objected with much force that the expense of maintaining such a court in permanent session would be irksome to all the Powers and that upon some of them it would bear somewhat heavily. It was also urged that such a court, in continuous solemn session, having, certainly, during intervals of many months, and perhaps even during years, nothing to do, would probably become an object of ridicule, and that finally, even among the greater Powers, a sentiment would probably arise which would give opportunity for demagogues to move to strike out the appropriations for the maintenance of a court apparently accomplishing nothing. These considerations prevailed, and the tribunal was established as we now have it. It is my belief that any effort to change the present system during the session of 1907 will be met by the same arguments which were urged in 1899, and with the same result."

Furthermore, the members of the court of 1899 are appointed for a term of but six years, though their appointment is renewable. The judges of the new court would have a term of twelve years, which is also renewable. The judges of the court of 1899 are paid only when they are on duty, which is when they have a case to try. The judges of the new court would be put on a salary of \$2,400 a year from the time of their appointment and receive about \$40 a day with traveling expenses additional when called into session. The draft of the agreement contemplates an annual session beginning the third Wednesday in June, provided public business requires it; otherwise, the election annually of three of the members, with substitutes, as a permanent delegation in residence at The Hague and always ready to try minor cases or cases for summary procedure. The delegation is a unique and promising feature of the new court. It makes the court free and easy of access, which is desirable, and is an advantage over the system of the court of 1899, whose tribunals have to be especially summoned even for a minor case. It is given large power, but cannot perpetuate itself at the expense of the whole court as it is

⁸ See *Mohonk Conference Report*, 1907, p. 30.

not only subject to election by the general body, but may at any time, on application of the nations, be superseded by it. The whole court may at any time be summoned in extraordinary session by the delegation. The delegation may act as a Commission of Inquiry and as such may have associated with it nationals of the States parties to a case who, though not members of the court itself, may assist in its investigations. This arrangement therefore supplies machinery for a permanent Commission of Inquiry, such as might take a case like the Dogger Bank incident, with the assistance of naval experts, or any case in which facts are in dispute, and report on its findings. The world has never yet had a permanent commission like this. Provision for it is potentially a great peace measure.

One of the advantages in permanence is continuity of jurisprudence. It was believed that the system of long tenures of office and the provision for a delegation always on duty would tend to the creation of precedents that would ensure continuity of jurisprudence, which is one of the chief purposes of the court. Later its decisions might furnish material for a code of international law, an ideal that in the last generation was held up before the nations by David Dudley Field, and has since been supported by the Inter-parliamentary Union.⁹

The criticism made by Mr. Root that arbitral procedure has been diplomatic rather than judicial, is met by the requirements for the fitness of the arbitrators. Both the court of 1899 and the court proposed in 1907, contemplate the selection of members of high moral character and recognized competency in international law, but the plan for the new court, unlike that of the institution of 1899, insists that they shall have qualifications as judges according to the standards of their own country or have a reputation as jurists. Here is a safeguard against the choice of mere politicians or diplomatists to adjudicate matters in which compromise, negotiation, and compliance with excited public sentiment, are out of place, but in which only the application of the law to the merits of the case is in order, which was Mr. Root's idea as expressed in his New York speech.

The court, as already indicated, in the first article (see ante), also contemplates the use of the prevailing systems of jurispru-

⁹ *The Inter-parliamentary Union and Its Work*. J. L. Tryon. American Peace Society pamphlet, 1907. p. 7.

dence, Roman, Spanish and Anglo-Saxon, which its practice is expected to harmonize.

The proposed Judicial Arbitration Court, to be sure, if installed today, would not be open to all nations as is the present Hague Court, but only to the nations who accept it by entering into a special contract. These nations, however, acting as a whole and not as individuals, are to pay the salaries of the judges, a method that is an improvement on the court of 1899, as under its system each litigant pays its own judges, a thing that would not be tolerated in a judicial court in municipal law. The costs of the proposed court apart from the salaries of the officers are apportioned among the litigants, who are also required to pay their own charges for counsel, witnesses, etc. No judge will be allowed to sit on a case in the decision of which he has already taken part in its earlier stages in national courts, nor can he appear before the court as counsel or advocate in any case as men have done before the court of 1899. A judge is not permitted to receive money or hold any office under authority of one of the litigants or of his own nation inconsistent with his duties as a judge. In these respects, then, the new court is more truly judicial than the court of 1899, and, though limited to the contracting powers, is fundamentally more international in its spirit.

Such are some of the superior features of the Court of Arbitral Justice. It is not, however, intended to supplant the court of 1899, but to be used instead of it if litigants prefer its services. There is an understanding that its members may be taken from the better qualified judges of the Permanent Court of Arbitration. In common with that court it follows the procedure laid down in the Convention for the Pacific Settlement of International Disputes, except as it is empowered specifically to make its own rules. Its jurisdiction is as large as possible. It may take cases coming to it by a standing treaty of arbitration or by a special agreement. The United States and Germany suggested that it might also be used as a court of revision or review, but their suggestion was rejected. As already pointed out, members of it may act as a Commission of Inquiry. They may also serve in the International Prize Court. With such large and varied possibilities the Court of Arbitral Justice ought, when established, to attract nearly all controversies between the nations.

The projected court has the further advantage of being allowed to formulate the preliminary conditions of an intended arbi-

tration, which is known as the *compromis*, unless that be specifically excluded from its powers or is otherwise provided for by treaty. This formulation may be made at the request of one of the parties when diplomacy has failed and the other party is reluctant to arbitrate. The power to make it corresponds somewhat to the forcible citation to court of one party by another in municipal law. This provision, however, does not apply to the twenty-four treaties made between the United States and other Powers as the preliminary agreement under them must, in every case, be made by the President and the Senate. It is, however, especially applicable to disputes relating to contractual debts, an agreement to arbitrate which may be made a dead letter by delaying the *compromis*.

The court is supposed to sit at The Hague, but may sit elsewhere if obliged to do so. It may call upon States to help it in serving notices and securing evidence. It determines the language that is to be used in cases coming before it. It discusses its cases and makes decisions upon them in private under the control of a president or vice-president, but a judge, who is appointed by one of the parties in cases in which the appointment of additional judges is permitted, may not preside. (See particularly rules for the delegation.) Its decisions must be made in writing by a majority of the judges present, who must give the reasons for their opinions and disclose their names. The court is authorized to improve upon its rules of procedure, but must communicate them to the contracting Powers for approval.

The draft of the new court was approved by the Second Hague Conference, except as to the selection of judges, Switzerland reserving its vote, but the court itself has not come into operation. This fact may occasion surprise and wonderment, but is easily understood when once the present condition of the doctrine of the equality of nations is explained. Theoretically, and, for most purposes, practically, the sovereign States have equal rights in international law, but each is tenacious of its rights, the smaller and the newer States being, if anything, more jealous of them than their larger neighbors. As Mr. Choate put it in his humorous way, in an address at the Harvard Union two or three years ago, Panama cannot see why she is not as important as England. But States as big as England take a different view of the matter; they believe that they should have special consideration, and are un-

willing to trust their interests to judges appointed by the smaller States on the same terms with themselves.

No plan within the political ingenuity of The Hague Conference could determine satisfactorily how fifteen judges could be equitably apportioned among forty-six States. The scheme adopted for the Prize Court of having fifteen judges sit in rotation, those of the greater Powers, with correspondingly large maritime interests, eight in all, Germany, Austria-Hungary, United States, France, Great Britain, Italy, Japan and Russia, having judges sitting all the time, and those of the smaller Powers some of the time, in a fixed period of years, though acceptable for the settlement of claims resulting from war, was not acceptable for the adjudication of differences that might cause war. This scheme was defeated by Senator Barbosa of Brazil, who declared it was based upon military and naval force instead of upon population and intelligence, and was, therefore, unjust to the interests of the less powerful States, particularly to those of South America.¹⁰ Probably most men will agree that the world will be better off in the end by adopting a plan that recognizes the equality of nations in every sense of the word; but much is to be said in favor of the rotation system as reported by Professor Scott and others at the Conference.¹¹ Professor Scott in his address showed that the rotation plan was based upon population. This recognizes the material interests of the nations, to which litigation has a proportionate relation. New York, for example, has more legal business than Rhode Island, because it is a bigger State than the latter. So England would have more legal business before this court than Panama. This plan also provides for adequate representation of the principal systems of jurisprudence, which is essential to international justice.

The appointment of a judge by each of the forty-six nations was suggested by Senator Barbosa, but his suggestion was afterwards withdrawn. The election of fifteen judges by a plurality or majority vote of the Secretaries of State of all the nations desiring the court would seem to be a reasonable solution of the problem, but has not been tried. Suggestion is now made that the

¹⁰ For Barbosa's remarkable speech, see the *New York Independent* for January 9, 1908; Hayne Davis': *The Second Peace Conference at The Hague*, pp. 73-77; and the *Advocate of Peace*, February, 1908.

¹¹ For Scott's argument, see *Pennsylvania Peace Congress Report*, 1908, p. 98.

difficulty be met by conferring the jurisdiction of the Court of Arbitral Justice upon the Prize Court.¹² The Conference left the matter to be adjusted by negotiation. When, therefore, a method of appointing the judges is agreed upon, the new High Court of Nations will get to work. That it may go into operation soon and become a recognized means of settling the disputes of nations judicially, as is fondly hoped by its distinguished legal advocates, should be the wish of every lawyer and of every friend of international peace.

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¹² See Scott's paper in the *Chicago Peace Congress Report*, 1909, p. 238. Compare also his remarks in the *Mohonk Report*, 1909, p. 55. That this course may be seriously considered is probable. Secretary Knox in his speech before the Pennsylvania Society of New York, in December, said: "Very recently the State Department has proposed in a circular note to the Powers that the Prize Court should also be invested with the jurisdiction and functions of a Court of Arbitral Justice. The United States as the originator of this project is confidently yet anxiously looking forward to its acceptance by the Powers, which will give to the world an international judicial body to adjudge cases arising in peace as well as controversies incident to war." Reported in *New York Sun*, December 12, 1909.